

1 THE HONORABLE JOHN C. COUGENOUR

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6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 ZANGO, INC.,

11 Plaintiff,

12 v.

13 KASPERSKY LAB, INC.,

14 Defendant.

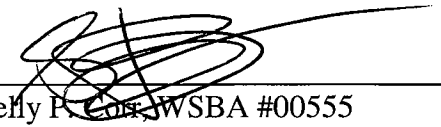
No. C07-0807 JCC

**DECLARATION OF GREGG
BERRETTA**

15 Attached hereto is the Declaration of Gregg Berretta.

16 DATED this 29th day of May, 2007.

17
18 CORR CRONIN MICHELSON
19 BAUMGARDNER & PREECE LLP

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21 
22 Kelly P. Corr, WSBA #00555
23 Steven W. Fogg, WSBA #23528
24 Attorneys for Plaintiff
25 Zango, Inc.

DECLARATION OF GREGG BERRETTA – 1
No. C07-0807 JCC

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Plaintiff Zango, Inc. herein.

I hereby certify that on May 29, 2007, I electronically filed the attached foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following persons:

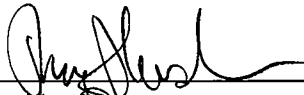
Bruce E.H. Johnson
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

and I hereby certify that I have delivered via U.S. Mail the document to the following non CM/ECF participants:

N/A

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of May, 2007, at Seattle, Washington.



Joyce Abraham

DECLARATION OF GREGG BERRETTA – 2
No. C07-0807 JCC

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SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ZANGO, INC.,

Plaintiff,

v.

KASPERSKY LAB, INC.,

Defendant.

No. 07-2-16532-1 SEA

DECLARATION OF GREGG BERRETTA

Gregg Berretta states and declares as follows:

1. I am the Director of Industry Affairs for plaintiff Zango, Inc. ("Zango").

I have personal knowledge of the matters stated herein and I am competent to testify to these matters.

2. Zango is an online media company based in Bellevue, Washington that provides consumers free access to a large catalog of online videos, games, music, tools and utilities. Zango offers four downloadable software applications branded as follows: "Zango," "Seekmo," "Hotbar," and "Spam Blocker Utility." These essentially identical Zango products are offered to customers free of charge and are sponsored by advertising that customers agree to view as a condition of using the products. Zango also offers a premium version of its Hotbar- and Spam Blocker Utility-branded software that gives consumers access to Zango's content catalog without having to agree to see advertising.

DECLARATION OF GREGG BERRETTA – 1

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COPY

1 3. Zango's proprietary software displays advertisements (to all non-premium
2 users) while Zango customers are browsing or searching the Internet online. Zango's
3 software is designed to locate products and services that are of interest to Zango customers. It
4 does this by recognizing keywords from customers' Internet browser and displaying relevant
5 advertisers' websites for matching products and services. Zango's software never collects the
6 personal identifying information of its users.

7 4. On March 8, 2007, Zango's testing lab discovered that Kaspersky's consumer
8 program "Kaspersky Internet Security" ("KIS") was damaging a Zango website named
9 seekmo.com by removing Zango weblinks from computers running the KIS program. Further
10 tests revealed that KIS was damaging and removing promotional links hosted by Zango
11 publishers as well. Zango contacted Kaspersky on March 9, 2007, regarding the damage
12 being done by KIS. On March 12, 2007, Kaspersky admitted that KIS was damaging Zango's
13 website and requested time to fix the issue. Testing performed by Zango's lab on March 14,
14 2007 showed that KIS was no longer damaging Zango's webpage.

15 5. On March 21, 2007, Zango's lab discovered that similar damage (i.e., missing
16 web links) was being caused by companies that, upon information and belief, were OEM
17 customers of Kaspersky's anti-virus engine product ("KAV"). Zango notified one of these
18 OEM customers immediately. On March 22, 2007, Zango notified a second OEM using KAV
19 that it was damaging Zango's website. On March 28, 2007, the second OEM resolved the
20 issue, and stated in communications with Zango that Zango was using "Best Practices," and
21 that Zango's products are "not malicious." The first OEM requested additional time to
22 address Zango's concerns, and subsequently communicated to Zango that it would contact
23 Kaspersky to resolve the issue.
24
25

1 6. On May 21, 2007 Zango testing revealed that some Kaspersky OEM customers
2 are still damaging Zango websites and removing download links, without providing any
3 customer notice or warning. This was determined despite assurances Kaspersky made to
4 Zango six weeks earlier that the damage to Zango's websites would be remedied.

5 7. On May 8, 2007, Zango informed Kaspersky via email that Zango testing had
6 identified additional "major issues" regarding the manner in which KIS treated Zango's
7 software applications. Testing revealed that, once KIS was running on a user's computer, a
8 user was allegedly given a choice to "Allow" Zango's programs to run. However, the
9 "Allow" choice offered by KIS proved illusory, as KIS continually caused warnings to appear
10 on the user's screen no matter how many times the Zango customer clicked "Allow." Testing
11 revealed that KIS did not treat the software of a known Zango competitor in the same manner.

12 8. On May 21, 2007, Zango testing of KIS version 6.0.2.621 revealed an even
13 more serious attack on Zango. Once this version of KIS is installed, it blocks any installation
14 of Zango software, and blocks users from accessing Zango content. In addition, KIS still
15 causes a user to click "Allow" every time Zango attempts to deliver an ad; this is true even if
16 the user clicks "Always Allow."

17 9. In the course of blocking installation of Zango's software, KIS identifies
18 Zango products as "malicious" and as an "infection." Kaspersky knows full well that this is a
19 false and misleading description, as Zango has provided Kaspersky with assurances that
20 Zango is in compliance with an order of the Federal Trade Commission, has provided
21 multiple opportunities to test Zango's software and programs, and provided Kaspersky with
22 an independent third party review confirming that Zango's products pose no danger to
23 customers or their computer security.

24 10. Additional testing performed on May 21, 2007, revealed that KIS damages
25 Zango's products in such a way that the computer user is unable to uninstall Zango. The

1 inability to uninstall the Zango software through normal Add/Remove procedures is a direct
2 violation of Zango's terms of service.

3 11. Attached hereto as Exhibit A are true and correct copies of communications
4 via email received by Zango technical support services from Zango customers reporting that
5 one of Kaspersky's OEM customers disabled Zango products and that customers were
6 prevented from installing Zango products by Kaspersky's OEM customer.

7 12. Since May 8, 2007, I have repeatedly attempted to contact Kaspersky to
8 request the removal of Zango products from the Kaspersky Anti-virus engine and detection
9 databases. My request to Kaspersky – to remove all references to Zango from their product
10 and detection databases – was the least onerous request that could be made to a scanning
11 application vendor. It is common knowledge in the industry that in order to reduce the time
12 period during which users might be unprotected, detection databases can be and typically are
13 updated hourly. Urgent updates are released immediately after a "signature" has been added
14 to the detection database. The average update size (around 30KB) is not burdensome to
15 consumers. My request to Kaspersky was to actually reduce rather than increase the size of
16 the database. Changing the database is something that Kaspersky does many times a day
17 during the normal course of business. Changes in the database would have no negative
18 impact on Kaspersky's existing consumer or OEM customer base.

19 13. Kaspersky acknowledges publicly on their website that their anti-virus engine
20 and detection database powers at least 50 and as many as 150 OEM customers. To date, the
21 only OEM vendors that Zango has been able to confirm through our research are PC Tools,
22 CheckPoint, and AOL.

23 14. To date, Kaspersky has not complied with the request to remove Zango's
24 products from the Anti-virus engine or the detection databases, despite the fact that Zango
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DECLARATION OF GREGG BERRETTA – 4

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1 provided a report from an independent third party reviewer confirming that Zango products do
2 not constitute threats either to the user's computer or personal security.

3 15. Our most recent tests (as of May 21, 2007) indicated that the currently
4 available version of Kaspersky Internet Security still damages existing installations of Zango
5 software and continues to prevent installation of Zango software by new customers. Further,
6 our testing demonstrates that at least one of Kaspersky's OEM customers is still removing the
7 download link from our seekmo.com website in addition to preventing installation of Zango
8 software.

9 16. Zango has suffered significant damage to its reputation, customer base and
10 business model as a result of the actions of the Kaspersky software described above. That
11 damage includes: the on-going loss of millions of dollars in revenue; preventing potential
12 customers from installing Zango programs; disabling or interfering with the use of Zango
13 programs by existing Zango customers; harming Zango's reputation with individual
14 customers and prospective partners, publishers and advertisers; destroying Zango's ability to
15 recoup, through both paid and ad-supported software versions, the cost of acquiring and
16 licensing for distribution the extensive content in Zango's content catalog (estimated value:
17 several million dollars); chilling Zango's ability to partner with new content providers and
18 distribution channels, thereby hindering Zango's expansion plans and devaluing its
19 investment in offices, operations, infrastructure, and employees in Washington state, North
20 America, and other parts of the world; and in other ways not yet realized or fully understood.

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 DATED this 24th day of May, 2007 at Seattle, Washington.

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6 Gregg Berretta
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DECLARATION OF GREGG BERRETTA – 6

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EXHIBIT A

From: vipsupport [vipsupport@hotbar.com]
Sent: Wednesday, May 16, 2007 12:21 AM
To: Rachel Shafir
Subject: FW: RE: Re:Unable to load Hotbar [941980:457277]

-----Original Message-----

From: "VIP Support" <vipsupport@hotbar-inc.com>
Sent: 5/9/2007 11:59 AM
To:
Subject: FW: RE: Re:Unable to load Hotbar [941980:455493]

Dear Peter,

Thank you for your reply and information.

Unfortunately there is a problem of incompatibility between Hotbar and Spyware Doctor. Sometimes, even though Hotbar is added to the "permitted files" list, and even if you remove Spyware Doctor from your computer, Hotbar may not function properly. We have contacted Spyware Doctor and informed them about the problem, and they are working to fix it, but so far the issue has not been solved.

We therefore suggest to cancel your membership to Hotbar.
We apologize for any inconvenience. Please let us know how you wish to proceed.

Have a great day,

Keren C.
VIPsupport@hotbar.com
VIP Customer Service
Hotbar.com, Inc.

-----Original Message-----

From:
Received: 5/7/2007 5:35 PM
To: vipsupport@hotbar.com
Subject: RE: Re:Unable to load Hotbar

Dear Support,

My order no. is Swreg Order Number: U22439808
I've opted for the paid version yr ad claim there will be no
pop up, spyware and other malicious adwares and such.

Hver my Spyware doctor is almost any attempt for me to install hotbar due to the presence of large amount of

5/17/2007

the adware,malware and such.

How do I load yr product.
I want to use Hotbar.

Rgds
Peter

5/17/2007

From: vipsupport [vipsupport@hotbar.com]
Sent: Wednesday, May 16, 2007 12:20 AM
To: Rachel Shafir
Subject: FW: Re: Keep losing my Hotbar icons [930492:457276]

-----Original Message-----

From:
Received: 4/22/2007 6:17 PM
To: "VIP Support" <vipsupport@hotbar-inc.com>
Subject: FW: Re: Keep losing my Hotbar icons [930492:451434]

Keren C.

Thanks for the comeback on my problem... However, it seems Hotbar is having problems with many of the Antivirus programs... I recently had AVAST and had the same problem... That...is why I switched to AVG.. didn't have any problems with your Hotbar... until the Spyware Doctor problem..

I really like the capabilities of your Hotbar and would like to download it again.. However, every time I got to WWW.hotbar.com , up comes your Home page.. and it only tells all about Hotbar.. and there is no place on the page to move to a download page..

Please advise... In the meantime, I will look for the "allow" template in Spyware Doctor...

Robert...

----- Original Message -----

From: VIP Support
To:
Sent: Sunday, April 22, 2007 3:28 AM
Subject: RE: Keep losing my Hotbar icons [930492:451434]

Dear Robert,

Thank you for your mail.

Unfortunately there is a problem of incompatibility between Hotbar and Spyware Doctor. Sometimes, even though Hotbar is added to the "permitted files" list, and even if you remove Spyware Doctor from your computer, Hotbar may not function properly. We have contacted Spyware Doctor and informed them about the problem, and they are working to fix it, but so far the issue has not been solved.

We therefore suggest to cancel your membership to Hotbar.
Please let us know how you wish to proceed.

5/17/2007

Have a great day.

Keren C.

VIPsupport@hotbar.com

VIP Customer Service

Hotbar.com, Inc.

-----Original Message-----

From:

Received: 4/20/2007 5:19 AM

To: vipsupport@hotbar.com

Subject: RE: Keep losing my Hotbar icons

Sir...

I have been having a lot of trouble keeping my Hotbar Premium Icons in my e-mail...

I recently uninstalled my AVAST antivirus which was knocking out my Hotbar..

I reinstalled AVG and was having NO problems..

Then tonight I ran my Spyware Doctor program.. and looked up ... and my Hotbar was gone again...

Sure be nice to keep it in my e-mails...

Programs I am running periodically are: Register Mechanic.... Spyward Doctor... and of course my AVG program runs in the background...

Need some help.. or I am going to give up on the Hotbar icons...

Looking forward to your assistance....

Robert

No virus found in this incoming message.

Checked by AVG Free Edition.

Version: 7.5.463 / Virus Database: 269.5.7/771 - Release Date: 4/21/2007 11:56 AM

5/17/2007